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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

K. S. et al., Petitioners, v. THE SUPERIOR COURT OF BUTTE COUNTY, Respondent; BUTTE COUNTY DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES et al., Real Parties in Interest.	C061639 (Super. Ct. No. J32846)

K.S. (Mother) and E.R. (Father) (collectively, petitioners), the parents of B.R. (the minor), seek an extraordinary writ to vacate the orders of the juvenile court denying reunification services and setting a hearing pursuant to Welfare and Institutions Code section 366.26.[1] (Cal. Rules of Court, rule 8.452.) Petitioners contend the court erred by

[1] Further undesignated section references are to the Welfare and Institutions Code.

denying them services. Father also claims he was denied due process when the court took judicial notice of his criminal files without providing him notice. Finding no merit to these claims, we deny the petitions and vacate the stay of proceedings previously granted.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2008, the Butte County Department of Employment and Social Services (the Department) filed a dependency petition concerning the two-year-old minor after Mother was arrested for child endangerment because she was found to be extremely intoxicated and unable to care for the minor. According to the petition, Mother's blood-alcohol level at the time of her arrest was .42 percent. Mother's roommate reported that Mother began drinking as soon as she got up each day and typically drank until she passed out.

At the time the petition was filed, Father was in jail on a probation violation because he had tested positive for alcohol and marijuana in September. Father had an extensive criminal record, including three drug-related convictions and two convictions for willful cruelty to a child. Shortly after Father was released from custody, he again tested positive for alcohol.

This was not the first time the minor had been the subject of dependency proceedings. He had been made a dependent of the court shortly after his birth in 2006 as a result of alcohol abuse and general neglect by petitioners, who participated in family maintenance services for a year before the dependency

proceedings were dismissed. Petitioners had also participated in reunification services with another child — S.R. — who had been removed in part due to petitioners' substance abuse, and their parental rights to this child were terminated in 2007. Mother had three other children who were no longer in her custody, two of whom had been born with methamphetamine in their systems in 1994 and 1996, respectively.

The juvenile court sustained the allegations in the petition and set the matter for a dispositional hearing.

According to the disposition reports, petitioners' reunification services with S.R. -- which included substance abuse treatment and a 12-step program -- were terminated because Mother had not addressed her substance abuse problems, Father had relapsed, and petitioners both failed to submit to testing. With regard to the circumstances leading to the minor's prior dependency case, Mother admitted that Father and she "drank together on numerous occasions" during her pregnancy with the minor.

In September 2008 (which was three months before the current petition was filed), the Department received a referral regarding petitioners, reporting that "alcohol abuse has begun again" and "[b]oth parents admit to drinking alcohol," although the allegations of general neglect were found to be inconclusive. Six weeks later, Father was ordered to serve 90 days in jail and complete a chemical dependency program because he violated probation. Father was still in custody when Mother was found to be incapacitated as a result of being intoxicated.

Shortly after his release from custody, Father again tested positive for alcohol.

Father, who was 37 years old, reported he began using alcohol and drugs when he was age 14 and his father had been an alcoholic. According to the social worker, Father continued to minimize the circumstances leading to the minor's removal and the seriousness of Mother's and his substance abuse problems.

While Mother was in custody, she attended 12-step meetings and completed written assignments from the social worker related to substance abuse, parenting and mental health. Father participated in a substance abuse assessment and was directed to continue participating in the services he was receiving as part of his probation, which included a relapse prevention program, three 12-step meetings per week, and a 12-session chemical dependency program.

Petitioners exhibited love and concern for the minor. They both acknowledged they had relapsed and needed services to support their sobriety. Mother felt she needed a year-long residential substance abuse treatment program and that she had long-standing emotional problems she had not addressed related to having been sexually abused by her stepfather, who was the father of three of her children. However, the social worker recommended that reunification services be denied based on petitioners' failure to reunify with other children and their history of substance abuse combined with their recent usage.

At the dispositional hearing in March 2009, Mother acknowledged she relapsed and did not complete drug treatment

during the dependency proceedings with S.R., but she testified that she subsequently completed a two-month program followed by a one-year program during the minor's previous dependency proceedings. However, according to Mother, these programs were "[n]ot really" helpful because she did not "open up" about the abuse by her stepfather. She maintained that she nonetheless remained "clean" for two years, until her relapse with alcohol two months before the minor was removed.

Mother testified that, although she had completed programs in the past, she believed this time would be different because she had "God back in [her] life" and was starting to speak about the abuse she had suffered. She had entered a one-year program, which included counseling services, and was attending AA meetings five days a week. Mother felt she was making a reasonable effort to treat her substance abuse problem by "being open and honest about what [was] happening in [her] life and addressing [her] problems."

Mother testified that, prior to his removal, the minor always had been in her care. Mother stated: "He loves me and I love him. He's very attached. . . ."

Father testified he had been on probation since 2005 and that his terms and conditions required him to not use drugs or alcohol. After his relapse in September 2008, Father attended outpatient programs until he was remanded on his probation violation. He admitted using alcohol after he was released from custody for his probation violation, explaining that he was depressed about his family situation and "had a few beers."

Father testified that he was "very aware . . . once [he] relapsed" that he needed to get back into treatment, and he was participating in the services that he attended prior to going into custody.

The social worker confirmed that Mother had cooperated with the Department and was active in her participation in services, which were mandated as part of her probation. However, based on Mother's history, the social worker felt her long-term prognosis was poor. She testified that the Department had known about Mother's sexual abuse problems during previous dependency cases and, thus, Mother had had the opportunity to address those problems before.

Prior to making its ruling, the juvenile court announced that it was considering all previous reports in the minor's file, which included reports from the minor's prior dependency proceeding. The court also stated that it was taking judicial notice of two of Father's criminal cases. The court noted that, prior to S.R.'s removal, Father used her as a shield when he was ordered by law enforcement officers to come out from some bushes where he was hiding, which resulted in his conviction in 2005 for felony child endangerment. The court also noted that, prior to the child endangerment conviction, defendant was convicted of driving under the influence of alcohol with a .12/.13 blood-alcohol level, and that S.R. was in the car and not belted into her car seat at the time. The court observed that Father's probation for this offense had been terminated unsuccessfully

after two probation violations, and that he was still on felony probation.

The court found that petitioners had a history of extensive, abusive and chronic drug and alcohol use and that their failure to maintain long-term sobriety constituted resistance to treatment for purposes of denying services under section 361.5, subdivision (b)(13). The court also rejected petitioners' argument with regard to section 361.5, subdivisions (b)(10) and (11), that they had made reasonable efforts to address the problems leading to removal of their other children. The court set the matter for a hearing pursuant to section 366.26 to select and implement a permanent plan for the minor.

DISCUSSION

I

Petitioners claim the juvenile court erred by denying reunification services. With regard to section 361.5, subdivision (b)(13), which provides that services may be denied when a parent has a history of extensive, abusive and chronic use of drugs or alcohol and has resisted court-ordered treatment during the three years preceding the filing of the current petition, they concede their histories of substance abuse satisfied the requirements for bypassing services but maintain that their conduct did not amount to resistance to treatment. We conclude there is substantial evidence to support the juvenile court's findings under section 361.5, subdivision (b)(13), rendering it "unnecessary for us to address the other ground[s] relied on by the juvenile court for denial of

services." (*In re D.F.* (2009) 172 Cal.App.4th 538, 546; *In re Jasmine C.* (1999) 70 Cal.App.4th 71, 76.)

Section 361.5, subdivision (b) provides that reunification services need not be provided to a parent if one of the enumerated bases for denying services is established by clear and convincing evidence. One of the bases for denying services is that a parent has a history of extensive, abusive and chronic use of drugs or alcohol and has resisted court-ordered treatment during the three years preceding the filing of the current petition. (§ 361.5, subd. (b)(13).) Numerous cases have held that the requirement of resistance to court-ordered treatment may be satisfied with evidence that the parent participated in court-ordered treatment but subsequently returned to substance abuse. (See, e.g., *In re Brooke C.* (2005) 127 Cal.App.4th 377, 382; *In re Brian M.* (2000) 82 Cal.App.4th 1398, 1402; *Laura B. v. Superior Court* (1998) 68 Cal.App.4th 776, 780; *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 73.)

"A court reviews an order denying reunification services under section 361.5, subdivision (b) for substantial evidence. [Citation.]" (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.)

A. Mother

Mother argues the juvenile court was precluded from finding she had resisted treatment because she had two years of sobriety preceding her most recent relapse. She relies on *Randi R. v. Superior Court*, *supra*, 64 Cal.App.4th 67, in which the appellate court noted that, "while [the mother] ha[d] technically

completed rehabilitation programs, her failure to maintain any kind of long-term sobriety must be considered resistance to treatment." (*Id.* at p. 73.) In *Randi R.*, the mother relapsed within one year of completing treatment on two occasions. (*Ibid.*) Similarly, here, the minor's prior dependency proceedings were dismissed less than a year before Mother's relapse, and she was still involved in treatment when the final status review report in that proceeding was prepared. Thus, Mother's reliance on *Randi R.* is unavailing.

Mother also argues she could not be found to be resistant to treatment because she successfully completed two treatment programs after her unsuccessful attempt at rehabilitation. But, as we have already explained, completion of a program followed by a return to substance abuse can constitute resistance to treatment. By her own account, Mother's relapse had been going on for two months at the time of her most recent arrest. There was evidence that she regularly ingested large amounts of alcohol while the minor was in her care, and her blood-alcohol level at the time of her arrest was .42 percent, underscoring the extent of her relapse.

Accordingly, substantial evidence supports the juvenile court's finding under section 361.5, subdivision (b)(13), that Mother was resistant to the court-ordered treatment she had received.

B. Father

Father argues that his two recent relapses -- one before the minor was removed, which resulted in his incarceration, and

the other soon after his release from custody -- "did not rise to the level of behavior demonstrating resistance to rehabilitation."

It is beyond dispute that Father had a history of extensive, abusive and chronic substance abuse: the child of an alcoholic, he had been drinking and using drugs since he was 14 years old; he had multiple convictions involving drug and alcohol abuse; and he continued to drink alcohol with Mother during the dependency proceedings concerning S.R., resulting in the minor's first dependency proceeding shortly after he was born. As with Mother, Father participated in court-ordered treatment as part of two prior dependency proceedings, including the successful completion of services in the minor's previous dependency case.

Yet, despite participating in various substance abuse services during the prior dependency proceedings, and despite being required to abstain from drugs and alcohol as a term of his felony probation, Father relapsed less than a year after the minor's first dependency proceeding was dismissed. Furthermore, according to the social worker, Father minimized the circumstances leading to the minor's removal and the seriousness of Mother's and his substance abuse problems, even though Mother had a potentially lethal amount of alcohol in her system at the time of her arrest. Moreover, Father relapsed again shortly after his release from custody, even though the minor at that point had been removed as a result of petitioners' substance abuse and despite having commenced substance abuse services

prior to serving his jail sentence. The reason for this second relapse -- that he was "depressed that [his] family was gone" -- demonstrates that Father continues to turn to alcohol and drugs when confronted with stressful situations, despite his involvement in court-ordered treatment and being subject to probation orders prohibiting this behavior.

In this context, in which Father relapsed twice within a short period of time, the second time after the minor had been removed and he had begun substance abuse treatment, the evidence belies Father's claim that his relapses "did not rise to the level of behavior demonstrating resistance to rehabilitation." Consequently, we conclude the juvenile court's denial of reunification services to Father pursuant to section 361.5, subdivision (b)(13), is supported by substantial evidence.

II

Mother maintains that, regardless of whether there was a valid basis for bypassing reunification services, the juvenile court erred by failing to order such services under section 361.5, subdivision (c). Again, we disagree.

As relevant here, section 361.5, subdivision (c) provides that the court shall not order reunification services for a parent described in section 361.5, subdivision (b)(13), "unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child."[2] We review

[2] Mother mistakenly cites the portion of section 361.5, subdivision (c), that addresses the court's discretion to grant reunification services when there is a basis for denial of

the denial of services under section 361.5, subdivision (c) for abuse of discretion. (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 523.)

"Once it is determined one of the situations outlined in [section 361.5,] subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.) "The burden is on the parent to change that assumption and show that reunification would serve the best interests of the child." (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.)

"The purpose of imposing a 'best interest of the child' standard '"is to maximize a child's opportunity to develop into a stable, well-adjusted adult."' [Citation.] Appropriate factors for the juvenile court to consider when determining whether a child's best interest will be served by pursuing reunification include: (1) the 'parent's current efforts and fitness as well as the parent's history'; (2) '[t]he gravity of the problem that led to the dependency'; (3) '[t]he "strength of relative bonds between" the dependent child and "both parent and caretakers"'; and, '[o]f paramount concern[;]' (4) 'the child's need for stability and continuity.' [Citation.]" (*In re D.F.*, *supra*, 172 Cal.App.4th at p. 547, emphasis omitted.)

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services under section 361.5, subdivision (b)(5) (jurisdiction based on severe physical abuse of a child under age five). Accordingly, we do not address Mother's argument that "services are likely to prevent reabuse," which is not a requirement under section 361.5, subdivision (c), when services are denied pursuant to section 361.5, subdivision (b)(13).

Here, although Mother again was making efforts to obtain treatment, she had participated in numerous programs in the past but had always returned to substance abuse. This history could properly give rise to skepticism with regard to her current efforts.

Mother's substance abuse had directly affected at least three of her four other children, none of whom were in her custody, and was the basis for the earlier dependency proceedings concerning the minor. The relapse that resulted in the current dependency proceeding involved a two-month long drinking binge by Mother, who had toxic levels of alcohol in her system at the time of the minor's removal. Thus, the gravity of Mother's substance abuse problem weighed heavily against pursuing reunification.

Nor was there compelling evidence that the minor's bond with Mother dictated in favor of pursuing reunification. Mother testified to the existence of this bond, but the social worker observed that the minor initially exhibited separation anxiety when leaving the foster mother to attend visits with Mother while she was in jail, and he appeared uneasy during these visits. Visits had improved significantly since Mother's release from custody, but the minor also "exhibit[ed] comfort in the presence of the foster mother." Furthermore, the tradeoff for attempting reunification in this matter unquestionably would be instability and uncertainty for the minor.

Mother points to evidence that she was actively participating in services, that she loves the minor, and that

her visits with the minor were positive once she was released from custody, in support of her argument that "substantial evidence was presented to support a finding that reunification with [her] would be in the minor's best interest." But this is not the issue before us. Rather, we must assess whether it was an abuse of discretion to conclude that there was an absence of clear and convincing evidence that services would be in the minor's best interest despite the applicability of a basis for denying services. That the evidence might also have supported a contrary finding is immaterial.

In light of all these circumstances, we conclude the juvenile court did not abuse its discretion by declining to order reunification services for Mother.

III

Finally, Father argues he was denied due process because the juvenile court took judicial notice of his criminal files without affording him notice and an opportunity to respond to the information considered by the court. We conclude any error was harmless.

Although the facts underlying a conviction contained in a criminal file are not generally subject to judicial notice (see *Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 145-148), here, these facts were contained, in substance, in the reports in the minor's dependency file, obviating any prejudice to Father. A 2006 dispositional report concerning the minor included the information that, in 2004, Father was arrested for "driving drunk" with S.R. in the car and not belted into her car

seat. The report also stated that Father was arrested for felony child endangerment in 2005 after using S.R. "to shield himself against [l]aw [e]nforcement's drawn guns." The dispositional report in the minor's current dependency matter includes information concerning the unsuccessful termination of Father's DUI probation and the fact that he remained on felony probation in the child endangerment matter. Any additional facts obtained from Father's criminal files did not add substantially, or prejudicially, to the information properly before the court in the minor's own file.

We note, additionally, that Father did not object when the court stated its intent to take judicial notice of his criminal files. (See Evid. Code, § 353.) For both of these reasons, we reject his claim.

DISPOSITION

The writ petitions are denied. The stay of proceedings previously granted is vacated.

NICHOLSON, Acting P. J.

We concur:

RAYE, J.

BUTZ, J.